81-1857

No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF OREGON,

Petitioner,

v.

JAMES EDWARD BRADSHAW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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QUESTION PRESENTED

Does a police officer violate the limits upon custodial interrogation established in *Edwards v. Arizona*, 451 U.S. 477 (1981), by reminding an arrestee who inquires, "What is going to become of me now?" of the arrestee's previously-asserted request for counsel and resuming his conversation with the arrestee, upon the arrestee's acknowledgment that he understands his rights?

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PETITION FOR CERTIORARI

The State of Oregon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on December 1, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing respondent's conviction (Appendix A, below) is reported at 54 Or. App. 949, 636 P.2d 1011 (1981). The order of the Supreme Court of the State of Oregon denying the State's petition for review of the decision of the court of appeals (Appendix B, below) is reported at 292 Or. 568, — P.2d — (1982).

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on December 1, 1981. The Supreme Court of Oregon denied a timely petition for discretionary review on February 3, 1982; and this petition for certiorari was timely filed within 60 days of that date, pursuant to Rule 20, as time is computed under Rules 28 and 29. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

Constitution of the United States, Amendment XIV:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Facts

Defendant Bradshaw was convicted in the state trial court of manslaughter in the first degree, driving while under the influence of intoxicants, and driving while his operator's license was revoked. At issue on appeal, and in this petition, is the admissibility into evidence of defendant's admission to a state police polygraph examiner that he was the driver of the vehicle involved in the fatal accident.

On September 14, 1980, state police corporal Hays interviewed defendant at a city police station, as a "possible suspect" in a vehicular homicide, after advising defendant of his *Miranda*[1] rights [Tr. 14, 16-17, 30, 32]. After denying that he had been involved in the accident, defendant stated, "And I do want an attorney before it goes very much further." Hays terminated the interview, placed defendant under arrest for furnishing liquor to a minor (presumably the deceased), and readvised defendant of his *Miranda* rights [Ex. 2].

Some time thereafter, either while still at the city police station or enroute to the county jail, defendant

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

asked Hays, "Well, what is going to happen to me now?" [Tr. 22]. In response, Hays testified at the pretrial hearing on the admissibility of defendant's post-arrest statements,

> . . . I says [*sic*], "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say — because — since you have requested an attorney, you know, it has to be at your own free will." I says [*sic*] "I can't prevent you from talking, but you understand your place — you know, where your standing is here?" and he agreed. He says [*sic*], "I understand," and — you know, and we had conversation from then on . . . .

[Tr. 22].[2]

In the course of the ensuing conversation, defendant agreed to take a polygraph examination concerning the accident under investigation, and such an examination was administered the next day [Tr. 23, 42]. Defendant again was advised of his *Miranda* rights prior to the examination, and he executed a written consent to the examination [Tr. 43-44].

At the conclusion of the examination, the polygraph examiner told defendant that it was his opinion that defendant had not been truthful in response to questions about whether he had driven the vehicle involved in the accident [Tr. 45]. Defendant thereupon

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[2]Hays's testimony concerning this matter is reproduced more fully as Appendix C, below. At the pretrial hearing on the admissibility of his statements, defendant did not challenge this testimony in any respect. His testimony at that hearing concerned only his later conversation with the state police polygraph examiner [see Tr. 69-71].

admitted to the examiner that he had driven the vehicle, after having consumed a considerable amount of alcohol, and had passed out behind the wheel [Tr. 45-46].

At the pretrial hearing on the admissibility of defendant's post-arrest statements, defendant testified that the polygraph examiner had told him that the police "had ways of breaking [his story] down to prove that [he] was driving the truck" [Tr. 70].[3] The polygraph examiner denied this [Tr. 75]. The trial court found that "The evidence establishes that there were no threats, promises, or inducements" on the part of the police underlying defendant's statements [Tr. 81].

B. Raising and Preserving of Federal Question

Prior to trial, the State requested a hearing on the admissibility of defendant's post-arrest statements, pursuant to *Jackson v. Denno,* 378 U.S. 368 (1964), and *State v. Brewton,* 238 Or. 590, 395 P.2d 874 (1964) [Tr. 10]. At the conclusion of the hearing, the trial court ruled as follows:

> . . . I find that the statements made to Officer — or, to Corporal Rainey [the polygraph examiner] are admissible. The evidence establishes that there were no threats, promises, or inducements, that the

[3]Only moments before defendant so testified, the trial court and counsel had engaged in a lengthy conversation concerning the facts and holdings of several confession cases, including *State v. Johnson,* 37 Or. App. 209, 586 P.2d 811 (1978), in which the police were held improperly to have induced an arrestee to confess, by telling him that his story was untrue and would not be hard to break down [Tr. 57-58, 60-62, 65-67].

> defendant was properly advised of his rights and that he did understand them and I also find that the evidence supports a conclusion that although Mr. Bradshaw had indicated his intent to have an attorney before it goes very much further, that within a short time after he made that statement he was initiating conversations in spite of the officer's replying to him, "I can't talk with you," and that I think that when I look at the total context of this, that there was, in fact, a change of this man's mind, that it was not brought on by any persuasion or argumentative kind of statements that were improper in any way and that the statements finally made to Officer Rainey — or, to Corporal Rainey were voluntary and followed a waiver and a knowing waiver of his right to remain silent . . . .

[Tr. 81-82].

On appeal to the state court of appeals, defendant assigned this ruling as error, as follows:

> The trial court erred in failing to suppress defendant's statements made after his assertion of the right to counsel.

[App. Br. at 10, *State v. Bradshaw,* 54 Or. App. 949, 636 P.2d 1001 (1981)].

When the court of appeals reversed defendant's conviction on this ground (Appendix A, below), the state petitioned the state supreme court for discretionary review, on the ground that

> The Court of Appeals erred in treating a police officer's reasonable response to an arrestee's question, "What is going to happen to me now?" as the functional equivalent of the "police-initiated" interrogation condemned in *Edwards v. Arizona,* — US —, 101 S Ct 1880, 68 L Ed 2d 378 (1981)

[Petition for Review at 1, *State v. Bradshaw,* 292 Or. 568, — P.2d — (1982).

REASONS FOR GRANTING THE WRIT

By treating a police officer's reasonable response to an arrestee's question, "What is going to happen to me now?" as police-initiated interrogation of the kind condemned in *Edwards v. Arizona,* the Oregon Court of Appeals has applied the Fifth Amendment in a manner which establishes in Oregon, and which threatens to serve as a precedent for establishing in other jurisdictions, erroneous standards for determining whether interrogation is improperly coerced, whether it is "police-initiated," and indeed, whether it is "interrogation" at all.

In *Edwards v. Arizona,* 451 U.S. 477 (1981), a case whose facts, as summarized in the Court's opinion, are so egregious that we are suprised it reached the Court without being reversed, this Court set aside the conviction of an accused who reasserted his previously-invoked right to counsel, only to be told that he "had" to talk to the police. The majority opinion of the Court stated:

> . . . [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation. We further hold that an accused, such

> as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

451 U.S. at 484-485.

The present case is not one in which the police should be held to have initiated further interrogation of an accused who had invoked his right to counsel. Defendant initiated the conversation himself, by inquiring of the arresting officer, "What is going to happen to me now?"

We do not agree with the state court of appeals that the conversation which followed defendant's inquiry must be deemed "interrogation," simply because it ultimately resulted in defendant's being asked to submit to a polygraph examination, which in turn led to his making incriminating admissions. This Court indicated that such is not the law in *Rhode Island v. Innis,* 446 U.S. 291 (1980).

But even if the resumed conversation must be deemed "interrogation," it cannot be deemed "police-initiated," in the manner condemned in *Edwards.* The arresting officer resumed the conversation only after defendant had inquired about his future, and only after the officer had warned him that resumption of the conversation would constitute a waiver of defendant's previously-asserted right to counsel.

And even if the state court of appeals correctly characterized the officer's conduct, in response to defendant's question, as "[taking] advantage of the opening to reinterrogate defendant," the officer cannot be said to have taken unfair advantage of a defendant who was fully warned that he was resuming a conversation which he was free to terminate again at any time. In this respect, at least, the arresting officer's resumption of his conversation with the defendant in this case more closely resembles the non-coercive questioning of a properly-advised defendant which was upheld in *Michigan v. Mosley,* 423 U.S. 96 (1975), than the coercive tactics condemned in *Edwards. Edwards* did not overrule *Mosley,* or at least did not do so expressly; and the rationale of *Mosley,* rather than that of *Edwards,* should be applied in cases like the one at bar.

If *Edwards* is properly understood as forbidding, on Fifth-Amendment grounds, any resumption of conversation between the police and an arrestee who has invoked his right to counsel — even when, as here, the accused initiates the conversation and is reminded of his constitutional rights — simply because the police might attempt, in the course of the renewed conversation, to obtain incriminating admissions, we respectfully submit that *Edwards* should be re-examined; and if the Oregon Court of Appeals has misunderstood the breadth of *Edwards,* it should be told so. The

Oregon court's construction of *Edwards* in this case not only significantly limits the extent of permissible police interrogation beyond that required by a proper reading of *Edwards*: it encourages the police to do nothing to assuage arrestees' understandable concern over their situation. Such a result is neither required by the Constitution nor desirable.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon.

Respectfully submitted,

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April 5, 1982